No. 79-1596

In the Supreme Court of the United States

OCTOBER TERM, 1979

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The Solicitor General, on behalf of the Secretary of the Interior, moves to affirm the relevant portion of the judgment of the district court.

OPINIONS BELOW

The main opinion of the district court (J.S. App. 21a-75a) is reported at 483 F. Supp. 425.[1] A supplementary opinion of the district court, issued in response to the Secretary's motion for a stay (J.S. App. 4a-16a), is reported at 483 F. Supp. 448. The opinion of the court of

[1]Unless otherwise indicated, "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Secretary of the Interior in No. 79-1538.

appeals at the preliminary injunction stage (J.S. App. 76a-85a) is reported at 604 F. 2d 312. The opinion of the district court at the preliminary injunction stage (J.S. App. 86a-101a) is not reported.

JURISDICTION

The final order of the district court (J.S. App. 17a-20a) was entered on January 3, 1980. An amending order (J.S. App. 1a-3a) was entered on January 21, 1980. The Secretary of the Interior filed a notice of appeal to this Court on February 1, 1980 (J.S. App. 102a-104a). Appellants filed a notice of appeal to this Court on February 11, 1980 (79-1596 J.S. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the Constitution provides in pertinent part:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in J.S. App. 106a-145a.

QUESTION PRESENTED

Whether Title V of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1251-1279, exceeds the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution.

STATEMENT

This cross-appeal involves a broad challenge to the validity of Title V of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1251-1279. Title V contains the statute's principal regulatory and enforcement provisions, including all the Act's mining performance standards, regulatory program procedures, permit system requirements, and specific enforcement measures.

The statute and the history of this litigation are fully described in 79-1538 J.S. 3-15. As noted there (*id.* at 8), appellants argued, *inter alia*, in the district court that Title V of the Surface Mining Act is invalid as a whole because it is beyond the scope of Congress' power to regulate interstate commerce under Article I, Section 8, of the Constitution. The district court rejected this general challenge to Title V, holding that "Congress' enactment of the federal surface mining act is within the scope of the commerce clause" (J.S. App. 26a).

The court acknowledged and deferred to the express congressional findings in Section 101(c) of the Act, 30 U.S.C. (Supp. I) 1201(c), that surface mining operations adversely affect interstate commerce in several specific ways (J.S. App. 26a-27a & n.1). See also 30 U.S.C. (Supp. I) 1201(j). The court recognized that its role was limited to determining whether Congress had a "rational basis" for enacting a particular regulatory scheme for the protection of commerce (J.S. App. 28a). The court then explained (*id.* at 28a-29a; footnote omitted):

> There is no question that coal moves in interstate commerce and that its production has a substantial effect on the national economy. * * * The Surface Mining Control and Reclamation Act of 1977 is an attempt by Congress to insure that surface mining of

> this valuable commodity is accomplished with regard to its impact on interstate commerce and the public welfare. Congressional recognition of the enormous and multi-faceted implications for commerce of improper reclamation * * * pervades the act's legislative history. Congress considered improper surface mining and reclamation a threat to the productivity of the mined land in terms of its ability to support other important forms of commerce. * * * If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce.

Emphasizing the potential environmental costs of unreclaimed or improperly reclaimed mining land, the district court concluded (*id.* at 29a) that "Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest."

ARGUMENT

The decision of the district court rejecting appellants' wholesale attack on Title V of the Surface Mining Act is correct, and appellants' Commerce Clause argument does not present a substantial federal question that merits this Court's attention. Accordingly, the judgment of the district court should be affirmed to the extent it holds that Title V does not exceed the scope of Congress' power to regulate interstate commerce.

The Commerce Clause grants Congress plenary power "to regulate commerce * * * among the several states * * *." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *National League of Cities* v. *Usery*, 426 U.S. 833, 840

(1976); *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden, supra*, 22 U.S. (9 Wheat.) at 196. In particular, this Court has repeatedly held that the Commerce Clause power extends not only to "the use of channels of interstate or foreign commerce" and "protection of the instrumentalities of interstate commerce * * * or persons or things in commerce," but also to "activities affecting commerce." *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971), and cases there cited.

In determining whether a particular exercise of power is valid under the Commerce Clause, a reviewing court must defer to a finding by Congress that the regulated activity affects interstate commerce, if there is any rational basis for that finding. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940). If there is a rational basis for such a finding, the only remaining question for judicial consideration is whether the means selected by Congress for the regulation of commerce are "reasonable" and "rational." *Heart of Atlanta Motel, Inc., supra*, 379 U.S. at 258-259; *Katzenbach* v. *McClung, supra*, 379 U.S. at 304. Once a court determines that Congress acted rationally in adopting a particular regulatory scheme, the judicial inquiry is completed. *Ibid.*

Appellants concede (J.S. 6) that coal is a commodity that moves in interstate commerce. They contend, however, that "the Surface Mining Act is directed not to the 'commerce' aspects of surface mining, i.e. the

operations involved in extraction, transportation and sale of surface mined coal, but deals entirely with aspects of land use" (J.S. 4). The asserted distinction between permissible regulation of "operations involved in extraction * * * of surface mined coal," on the one hand, and impermissible regulation of "aspects of land use," on the other, is unclear, and, in any event, appellants' argument involves a significant mischaracterization of the regulatory provisions contained in Title V of the Act. Moreover, appellants have failed to allege that any specific section of Title V has been applied to them in a particular factual setting. Their abstract challenge to the constitutionality of an entire federal regulatory program does not present any concrete legal issue that is ripe for adjudication.

Contrary to appellants' apparent contention, the regulatory scheme created by Title V is primarily concerned with "operations involved in extraction * * * of surface mined coal." That is the very subject with which the statute was intended to deal. Congress based its decision to adopt the Surface Mining Act on express findings that the methods used in extracting coal frequently have a direct and adverse impact on interstate commerce. These findings are set forth in detail in Section 101 of the statute itself (30 U.S.C. (Supp. I) 1201(c), (e), (g), (h), and (j)), and the legislative history of the Act includes numerous additional references to the undesirable effects of surface mining practices on the environment and the public health and safety. See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 58-60 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 50 (1977). Appellants have offered no basis for concluding either that Congress' findings are irrational or that the means chosen for controlling the adverse impacts of surface coal mining are ill-suited to the task. The federal courts have

uniformly held that the power conferred by the Commerce Clause is broad enough to permit Congress to regulate activities giving rise to air pollution, water pollution, or other environmental hazards,[2] and appellants do not dispute that the kinds of problems identified by Congress can appropriately be addressed through Commerce Clause legislation. In these circumstances, there is no substantial constitutional question remaining to be decided.

The Surface Mining Act does not require that land be used in any particular way. It does not require that coal be mined and it does not prohibit the surface mining of coal, except in certain narrowly defined situations. It also does not mandate a particular postmining land use once the operator's performance bond has been released. The Act provides only that mining operations must be conducted subject to certain precautions and restrictions, and, if surface mining methods are used, mined land must be restored to its approximate original contour at the completion of mining activities. Appellants' charge that the Act was intended to control land-use decisions by private property owners is simply inaccurate.

Appellants' assertion (J.S. 4-5) that, by enacting Title V, Congress has "created a comprehensive body of federal police powers designed to supplant the inherent police

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[2]See, *e.g.*, *United States* v. *Byrd*, 609 F. 2d 1204, 1209-1210 (7th Cir. 1979); *Sierra Club* v. *EPA*, 540 F. 2d 1114, 1139 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977); *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657, 663 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); *District of Columbia* v. *Train*, 521 F. 2d 971, 988 (D.C. Cir. 1975); *United States* v. *Ashland Oil and Transp. Co.*, 504 F. 2d 1317, 1325 (6th Cir. 1974); *Pennsylvania* v. *EPA*, 500 F. 2d 246, 259 (3d Cir. 1974); *South Terminal Corp.* v. *EPA*, 504 F. 2d 646, 677 (1st Cir. 1974); *United States* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), aff'd, 423 F. 2d 469 (4th Cir.), cert. denied, 398 U.S. 904 (1970).

powers of State and local governments" adds nothing to their argument. As this Court has stated, "[i]t is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941); *Cleveland* v. *United States*, *supra*, 329 U.S. at 19; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 147 (1938). The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over purely intrastate commerce. *United States* v. *Darby*, *supra*, 312 U.S. at 116; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-570 (1939). Moreover, as this Court has recently reaffirmed (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 840), Congress, in regulating private activities that affect interstate commerce, may pre-empt state laws that are contrary to the federal regulatory scheme. In particular, the Commerce Clause authorizes Congress to pre-empt state police power regulations that are inconsistent with the federal statute governing surface coal mining activities.[3]

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[3]Appellants have cited no pertinent authority in support of their argument that the Surface Mining Act is outside the scope of Congress' power under the Commerce Clause. Several of the cases to which appellants refer (J.S. 5) merely held that regulation of private land use is within the inherent police powers of the states and their political subdivisions, but these cases in no way suggest that such powers are exclusive or that the federal government may not regulate private activities that affect interstate commerce. The other decisions cited by appellants (J.S. 6) hold only that the states retain authority to regulate activities that do not affect interstate commerce and activities that may affect interstate commerce but concerning which Congress has not chosen to legislate.

CONCLUSION

The judgment of the district court should be affirmed to the extent it rejects appellants' Commerce Clause challenge to Title V of the Surface Mining Act.

WADE H. MCCREE, JR.
Solicitor General

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